Ron Sharer, a Sole Proprietorship, d/b/a Ron Sharer Tile & Marble *and* Bricklayers and Tile Setters Local No. 1 Trust Fund. Case 32–CA–13312

September 16, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

Upon a charge filed by Bricklayers and Tile Setters Local No. 1 Trust Fund (the Trust Fund) on July 16, 1993, the General Counsel of the National Labor Relations Board issued a complaint on August 31, 1993,[1] against Ron Sharer, A Sole Proprietorship, d/b/a Ron Sharer Tile & Marble, the Respondent, alleging that it has committed unfair labor practices in violation of the National Labor Relations Act. On September 17, 1993, the Respondent filed an answer denying the complaint's unfair labor practice allegations.

Thereafter, on January 6, 1994, the Regional Director for Region 32 approved an informal settlement agreement resolving the allegations in the complaint. On May 3, 1994, however, the Acting Regional Director issued an order withdrawing approval of the settlement agreement, and an amended complaint and notice of hearing realleging the same allegations contained in the prior complaint, on the ground that the Respondent subsequently failed to discharge its obligations under the agreement. Thereafter, on May 11, 1994, the General Counsel issued an amendment to the amended complaint.

Although properly served copies of the May 3, 1994 amended complaint and amendment thereto, the Respondent failed to file an answer. Accordingly, on August 8, 1994, the General Counsel filed a Motion for Summary Judgment with the Board. On August 10, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the amended complaint and amendment thereto affirmatively note that unless an answer is filed within 14 days of service, all the allegations in the amended complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region sent a letter by facsimile transmission dated July 14, 1994, notifying the Respondent that unless an answer was received by July 18, 1994, a Motion for Summary Judgment would be filed. Nevertheless, as indicated above, the Respondent failed to file an answer to the May 3, 1994 amended complaint.

Although the Respondent did file an answer to the original August 31, 1993 complaint, that answer was withdrawn by the explicit terms of the settlement agreement,[2] and was not thereafter revived by the Acting Regional Director's order withdrawing approval of the settlement agreement. Thus, as the Respondent's answer to the original complaint does not remain extant, it does not preclude summary judgment.[3]

Accordingly, in the absence of good cause being shown for the failure to file a timely answer to the May 3, 1994 amended complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, the Respondent, a California sole proprietorship with an office and place of business in Fresno, California, has been engaged in the construction industry as a tile and marble contractor. During the year preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, sold and shipped goods or provided services valued in excess of $50,000 directly to customers or business enterprises who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Tile Layers and Terrazzo Workers Local No. 1, International Union of Bricklayers and Allied Craftsmen, AFL–CIO (the Union) is now, and has been, a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[1] Subsequently amended on December 22, 1993.

[2] Form NLRB-4775, the settlement form used here, expressly provides that approval of the settlement agreement "shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case, as well as any answer(s) filed in response."

[3] See *Signage Systems*, 312 NLRB 1115 (1993); *Orange Data, Inc.*, 274 NLRB 1018 (1985); and *Ofalco Properties*, 281 NLRB 84 (1986).

All full-time and regular part-time tile layers, terrazzo workers and tile finishers employed by Respondent at its Fresno, California facility; excluding all other employees, guards and supervisors as defined in the Act.

Since about January 1, 1990, and at all times material, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and since that date the Union has been recognized as such representative by the Respondent. Such recognition has been embodied in a collective-bargaining agreement (the Agreement), effective by its terms for the period January 1, 1990, to December 31, 1991, "unless written notice of cancellation is given by registered or certified mail at least sixty (60) days prior to said expiration date. If such notice is not given, this Agreement shall continue in force from year to year thereafter, subject always to being terminated by said written notice prior to sixty (60) days of the anniversary date of December 31 of any year (hereinafter the Reopener Clause)." At no time has any party to the Agreement provided notice in accordance with the Reopener Clause. Accordingly, by virtue of the facts and circumstances set forth above, the terms and conditions of the Agreement have remained in full force and effect at all times material.

At all times since January 1, 1990, the Union, by virtue of Section 9(a) of the Act, has been, and is, the limited exclusive representative of the employees in the unit, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.[4]

The Agreement requires, inter alia, that the Respondent make monthly health and welfare, pension, vacation and apprentice trust fund contributions on behalf of eligible unit employees (the Trust Fund Contributions).

The Agreement further contains a provision requiring the Respondent to notify the Union of the names, addresses, and work classifications of all new unit employees hired, who were not secured through the Union, within 48 hours of their employment (the Reporting Requirement).

Since about January 16, 1993, the Respondent has failed and refused to comply with, and has effectively repudiated, the Reporting Requirement.

In January 1993, the Respondent ceased making Trust Fund Contributions on behalf of eligible unit employees who were not members of the Union, and in July 1993, the Respondent ceased making Trust Fund Contributions on behalf of all eligible unit employees.

Although the subjects set forth above relates to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining, the Respondent engaged in the conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct, and without the agreement of the Union.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good faith with the limited exclusive bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required Trust Fund Contributions on behalf of the nonunion members and all eligible employees, respectively, and to comply with the Reporting Requirement, we shall order the Respondent to honor the terms of the collective-bargaining agreement. In addition, we shall order the Respondent to make whole the nonunion members and all eligible unit employees for its failure to make the required Trust Fund Contributions on their behalf since January and July 1993, respectively, by making all such required Trust Fund Contributions that have not been made since January and July 1993, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, the Respondent shall reimburse the employees for any expenses ensuing from its failure to make the monthly required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502

[4] The complaint's commerce data and the unit description suggest that the Respondent is a construction industry employer subject to the provisions of Sec. 8(f) of the Act. Accordingly, in the absence of an allegation that the bargaining relationship was actually based on 9(a) majority support, consistent with the Board's practice in no-answer cases, we find that the relationship was entered into pursuant to Sec. 8(f), and that the Union is therefore the limited 9(a) representative of the unit employees for the period covered by the contract. See *Electri-Tech, Inc.*, 306 NLRB 707 fn. 2 (1992); and *Deboise Contractors Co.*, 308 NLRB 470 fn. 3 (1992) (citing *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988)).

In the absence of any need to determine in this proceeding whether the parties' relationship is governed by Sec. 9 or by Sec. 8(f), Member Browning would not reach that issue.

(6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Ron Sharer, a Sole Proprietorship, d/b/a Ron Sharer Tile & Marble, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Tile Layers and Terrazzo Workers Local No. 1, International Union of Bricklayers and Allied Craftsmen, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to make Trust Fund Contributions on behalf of all eligible employees, including nonunion members, and to comply with the Reporting Requirement:

> All full-time and regular part-time tile layers, terrazzo workers and tile finishers employed by Respondent at its Fresno, California facility; excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor the terms of the collective-bargaining agreement, and retroactive to January 1993, make all required Trust Fund Contributions that have not been made and provide the Union with information in accordance with the Reporting Requirement.

(b) Make whole the nonunion members and all eligible unit employees for any expenses incurred as a result of its failure to make Trust Fund Contributions on their behalf since January and July 1993, respectively, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Fresno, California, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. September 16, 1994

James M. Stephens, Member

Dennis M. Devaney, Member

Margaret A. Browning, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with Tile Layers and Terrazzo Workers Local No. 1, International Union of Bricklayers and Allied Craftsmen, AFL–CIO, as the limited exclusive collective-bargaining representative of the employees in the following unit, by failing and refusing to make Trust Fund Contributions on behalf of all eligible employees, including nonunion members, and to comply with the Reporting Requirement:

> All full-time and regular part-time tile layers, terrazzo workers and tile finishers employed by us at our Fresno, California facility; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor the terms of the collective-bargaining agreement and WE WILL, retroactive to January 1993, make all required Trust Fund Contributions that have not been made and provide the Union with information in accordance with the Reporting Requirement.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make whole the nonunion members and all eligible unit employees for any loss of benefits and expenses incurred as a result of our failure to make Trust Fund Contributions on their behalf since January and July 1993, respectively.

RON SHARER, A SOLE PROPRIETORSHIP,
D/B/A RON SHARER TILE & MARBLE